STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2007
v	No. 267953 Oakland Circuit Court
ROMMELL L. SANDERS, Defendant-Appellant.	LC No. 1992-116402-FC

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In 1992, defendant was convicted by a jury of first-degree premeditated murder, MCR 750.316(1)(a), and of possession of a firearm during the commission of a felony, MCR 750.227b. He was sentenced to mandatory life in prison for the murder conviction and a consecutive two years in prison for the felony-firearm conviction. He appealed as of right, and we affirmed.[1] He now appeals by leave granted[2] from the trial court's denial of his motion for relief from judgment. We affirm.

Defendant's conviction arose from an incident in which he stopped his car beside another car and exchanged verbal challenges with a man in the other car. The other man got out of the car and punched defendant. Defendant then shot and killed the other man. Defendant and the victim had been at the same party shortly before the shooting. There was evidence of bad blood between defendant and the victim. On direct appeal, defendant argued that the evidence was insufficient to convict him of first-degree premeditated murder, and that the prosecutor's closing argument destroyed the presumption of innocence. We held in *Sanders I* that the evidence was sufficient to sustain the conviction, and that the prosecutor's closing argument did not deny defendant a fair trial.

In this MCR 6.500 appeal, defendant first maintains that his trial and appellate counsel were ineffective because they failed to challenge the jury instruction on the duty to retreat. To

[1] *People v Sanders*, unpublished opinion memorandum of the Court of Appeals, issued November 10, 1994 (Docket No. 156042) (*Sanders I*).

[2] *People v Sanders*, 474 Mich 1018; 708 NW2d 384 (2006).

prevail on this argument, defendant must demonstrate that "counsel's performance fell below an objective standard of reasonableness," *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), and that either the trial result was unreliable, or there is a reasonable probability the result would have been different but for counsel's errors. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

The trial court instructed the jury in accordance with CJI2d 7.16, which at the time of defendant's trial provided:

> (1) By law, a person must avoid using deadly force if [he / she] can do so. If the defendant could have safely retreated but did not do so, you can consider that fact, along with all the other circumstances, when you decide whether [he / she] went farther in protecting [himself / herself] than [he / she] should have.
>
> (2) However, if the defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect [himself / herself] from an imminent threat of [death / serious injury / forcible sexual penetration], the law does not require [him / her] to retreat. [He / She] may stand [his / her] ground and use the amount of force [he / she] believes necessary to protect [himself / herself].

Defendant contends that under the circumstances he had no duty to retreat, and that as such the instruction was erroneous. In support of this contention, defendant cites *People v Crow*, 128 Mich App 477, 484; 340 NW2d 838 (1983). In *Crow*, this Court reversed a manslaughter conviction on the ground that the trial court improperly instructed the jury on the duty to retreat. *Crow*, *supra* at 490. The defendant in *Crow* had picked up a hitchhiker, who assaulted the defendant while they were both in defendant's car. *Id.* at 479-480. The defendant stabbed the hitchhiker and pushed him out of the car. *Id.* at 480. At trial, the court instructed the jury concerning the defendant's duty to retreat, using a version of the instruction similar to the instruction at issue here. *Id.* at 484. After reviewing the prosecution's closing argument, the *Crow* Court stated "because of the foregoing argument and instruction, we share the concern . . . that there was a 'possibility that the jury may have felt that the defendant's failure to retreat automatically required his conviction.'" *Id.* at 486, quoting *People v Johnson*, 75 Mich App 337, 345; 254 NW2d 667 (1977).

The circumstances in the instant case are markedly different from those in *Crow*. Most importantly, in *Crow*, the defendant was faced with the choice of retreating from his vehicle or repelling the attack. Here, defendant was in a vehicle and the victim was outside the vehicle. Further, in *Crow*, the prosecution argued that even if the defendant's version of the events was truthful, he still had a duty to retreat. Here, the prosecutor's argument was focused primarily on the question whether defendant planned to shoot the victim even before the encounter, and while there was some argument regarding the duty to retreat, it was clearly a subsidiary issue and one that would not be reached unless the jury rejected the assertion that the shooting was premeditated. We therefore conclude that defendant has failed to establish that he was prejudiced by counsel's failure to object to the instruction.

Defendant next argues that trial counsel was ineffective for failing to request an instruction on imperfect self-defense. Months before defendant's trial, the Court of Appeals recognized imperfect self-defense as a qualified defense that could mitigate second-degree murder to voluntary manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). See also *People v Kemp*, 202 Mich App 318, 323-325, 508 NW2d 184 (1993). Assuming, arguendo, that the instruction was supported by the evidence, defendant suffered no prejudice because the jury found that the shooting was premeditated. Imperfect self-defense can mitigate second-degree murder to manslaughter, but provides no defense to a premeditated murder.

Next, defendant argues that trial counsel should have called him to testify. This argument fails for two reasons. First, the record established that defendant knowingly and voluntarily waived his right to testify. Second, the decision not to testify is a matter of trial strategy. *People v Toma*, 462 Mich 281, 304; 613 NW2d 694 (2000). The record contains nothing to undermine the presumption that this strategic decision was reasonable. See *People v Daniel*, 207 Mich App 47, 58-59; 523 NW2d 830 (1994).

Lastly, defendant asserts four challenges to the prosecutor's closing argument. None of the challenges have merit. In the first three, defendant claims that the prosecutor argued facts not in evidence, but our examination of the record indicates that each of the challenged assertions was based on a fact in the record or on a reasonable inference from those facts. A prosecutor may urge the jury to draw reasonable inferences from the facts in evidence. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). The final challenge, that the prosecutor improperly vouched for a witness's credibility, is based on an incomplete quotation from the record. When viewed in context, the prosecutor's comments concerning the witness are clearly an explanation of the witness's lack of bias, made in response to defense counsel's legitimate closing argument. See *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). Thus, the assistance of both trial and appellate counsel is not rendered suspect. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood